U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 25 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:
[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president/chief executive officer (CEO). The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition concluding that the petitioner: (1) does not share a qualifying relationship with a foreign entity; and (2) has not established its ability to pay the proffered wage.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

> (1) Priority Workers. – - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. – - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Wooju Communications Co. Ltd., of Korea (Wooju Korea); (2) engages in the trade of visual communication systems; and (3) employs 19 persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of $50,000 per year.

The first issue to be discussed is whether the evidence establishes that the petitioner and the beneficiary's foreign employer share a common relationship pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C). Prior to his transfer to the United States, Wooju Korea employed the beneficiary. The petitioner claims that Wooju Korea is its parent company.

When filing the petition, the petitioner submitted evidence concerning its ownership, including its Articles of Incorporation, a copy of a wire transfer from [redacted] to the petitioner, and copies of its corporate income tax returns for 2000 and 2001 (Form 1120). In a June 5, 2003 request for evidence (RFE), the director asked for further documentation relating to the petitioner's ownership. This evidence included, but was not limited to, copies of the petitioner's stock certificates, its corporate stock ledger, and minutes of meetings.

In response, the petitioner's prior counsel submitted the requested evidence and a cover letter explaining the evidence. Counsel submitted a copy of a minutes of meeting, which showed tha[redacted] was the authorized recipient of 10,000 shares of common stock for the sum of $50,000. According to counsel, "There is no additional issuance of any stocks as of [the] date of this letter." Counsel also submitted a copy of stock certificate number one, issued to [redacted] for 10,000 shares of stock. Counsel stated, "No other stock certificate has been issued." Finally, counsel submitted a copy of the petitioner's stock ledger, which showed only the issuance of stock certificate number one to [redacted] Again, counsel asserted, "There is no other issuance as of the date of this letter."

The director denied the petition, in part, because the evidence regarding [redacted] alleged ownership of the petitioner contained significant discrepancies. According to the director, the petitioner's 1999, 2000 and 2001 corporate tax returns indicated that [redacted] owned 100 percent of the petitioner's shares of stock. The director noted further that the returns indicated that the petitioner had $85,959 in capital stock, not the $50,000 that the petitioner claimed to have received from Wooju Korea.

On appeal, the petitioner retains new counsel. According to counsel, the petitioner's accountant made a grievous error when preparing the petitioner's tax returns. Counsel submits new evidence to show that the petitioner is a subsidiary of Wooju Korea. This evidence includes: (1) stock certificate number two, which was issued to Wooju Korea for 7,192 shares of stock on February 25, 2000; (2) two new minutes of board of director meetings; (3) the petitioner's stock ledger, which now includes stock certificate number two; and (4) amended corporate tax returns. Counsel claims that the documentary evidence provided establishes that the petitioner is a subsidiary of Wooju Korea.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The

corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The petitioner has not adequately clarified the discrepancies in the evidence that the director noted in his denial letter. First, the petitioner has not presented any evidence from its accountant that he or she made errors when preparing the tax returns, including the reasons why such errors occurred. Counsel's assertions regarding the accountant's incompetence are not enough; without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, the petitioner has not explained the inconsistencies between statements from its former counsel and the new evidence that is being submitted on appeal. When responding to the director's RFE, the petitioner's former counsel stated clearly that no stock certificates, minutes of meetings, or stock ledger existed except for those that had been presented to CIS. Now on appeal, the petitioner presents a new stock certificate number two, minutes of meeting, and what appears to be an alteration of its stock ledger.

The evidence in the record concerning the relationship between the petitioner and Wooju Korea is not persuasive. No mention has been made about why the documents that the petitioner submits now were not presented earlier in this proceeding. Of particular concern is the corporate stock ledger, which now contains an entry for stock certificate number two that did not exist prior to the denial of the petition. In addition, the petitioner's prior counsel's statement about the non-existence of evidence that the petitioner now presents on appeal raises questions of whether such evidence actually existed prior to the director's decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based upon the evidence before the AAO at the present time, the unresolved inconsistencies do not enable CIS to find that the petitioner and Wooju Korea share a common relationship. Accordingly, the director's comments on this issue will not be withdrawn.

The second issue to be discussed is whether the petitioner has established its ability to pay the beneficiary's yearly salary of $50,000. Pursuant to 8 C.F.R. § 204.5(g)(2):

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence

> that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . .

When filing the I-140 petition, the petitioner submitted a copy of its 2000 and 2001 corporate tax returns. In a June 2003 RFE, the director asked the petitioner to submit its latest corporate tax return, Form 1120, which had been certified by the Internal Revenue Service (IRS). Specifically, the director asked the petitioner to submit its 1999, 2000, 2001 and 2002 federal income tax returns. In response, the petitioner's prior counsel stated that the petitioner was submitting "its signed corporate federal tax returns, from its establishment in 1999." Counsel stated further that with $2.5 million in assets, the petitioner had the ability to pay the beneficiary's salary.

The director denied the petition, in part, because the evidence failed to establish that the petitioner has the ability to pay the proffered wage. The director noted that the petitioner failed to submit a copy of its tax return for 2002. The director noted further that for the years 1999 through 2001, the petitioner had a negative net income and, therefore, it could not pay a wage of $50,000.

On appeal, counsel states that the petitioner's parent company, Wooju Korea, has sizable assets and is more than able to make substantial investments into the petitioner. Counsel also states that the petitioner "has its own available fund," but fails to elaborate on this statement or explain how the petitioner has the ability to pay the beneficiary's salary.

As stated previously, the petitioner indicated on the I-140 petition that it intends to pay the beneficiary a salary of $50,000 per year. In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did employ the beneficiary when the petition was filed on May 7, 2003. However, the petitioner did not present a copy of the beneficiary's W-2 form for the 2002 or 2003 years to establish the salary that it paid him. The AAO notes that the petitioner's 2001 tax return indicated that the beneficiary received $48,000 as compensation to an officer; however, this is not the proffered salary of $50,000 per year. In addition, there is no documentary evidence that such compensation was paid. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the fact that the petitioner employed the beneficiary at the time the priority date was established does not serve as evidence that it can pay the wage of $50,000 per year.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant*

Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As the petition's priority date falls on May 7, 2003, the AAO must examine the petitioner's tax return for 2002. However, although the director asked the petitioner to submit its 2002 income tax return, the petitioner declined to submit it when responding to the RFE. The regulations clearly establish that a petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Without the petitioner's 2002 tax return, CIS is unable to determine whether the petitioner had the ability to pay the proffered wage at the time the petition was filed. Accordingly, the AAO will not disturb the director's decision to deny the petition, in part, because the petitioner has not established its ability to pay the proffered wage.

Beyond the decision of the director, because the petitioner failed to establish that it shares a qualifying relationship with the beneficiary's foreign employer, Wooju Korea, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R § 204.5(j)(3)(i)(B). This regulation states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. In addition, the record does not contain a sufficiently detailed description of the beneficiary's proposed duties in the United States to establish that the proffered position is in a managerial or executive capacity. Although the director did not raise either issue in the denial letter, they are, nevertheless, additional reasons why the petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.